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No. 03-1693

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IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners,

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of *Amicus Curiae* Foundation for Moral Law, Inc. Suggesting Reversal

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutionality of a display of the Ten Commandments in a county courthouse should be determined solely by the text of the Constitution.

2. Whether, according to the text of the Establishment Clause, a display of the Ten Commandments in a county courthouse is unconstitutional.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF *AMICUS CURIAE*.....1

SUMMARY OF ARGUMENT 2

ARGUMENT.....3

I. THE CONSTITUTIONALITY OF THE KENTUCKY COUNTIES' TEN COMMANDMENTS DISPLAYS SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS. 3

A. Judges are sworn to uphold the written constitutional text.....3

B. The words of the First Amendment have been rejected in favor of *ad hoc* judicial gerrymandering. 4

C. Textual infidelity has papered over America's history and constitutional government that *embraces* acknowledgments of God and public expressions of religion. 6

D. This Court should return to the fixed rule of the constitutional text.....9

II. THE KENTUCKY COUNTIES' COURTHOUSE TEN COMMANDMENTS DISPLAYS ARE NOT UNCONSTITUTIONAL BECAUSE THEY ARE NOT "LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION." 11

A. Neither the displays, nor the Counties' actions in relation to the displays, are "law[s]." 11

B. The Counties' courthouse displays do not respect "an establishment of religion." 13

1. The definition of "religion" 14

2. The definition of "establishment" 19

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

CASES

ACLU of Kentucky v. McCreary County, Ky., 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000) 13

ACLU of Kentucky v. McCreary County, Ky., 354 F. 3d 438 (6th Cir. 2003) 5, 20

ACLU of New Jersey v. Schundler, 104 F.3d 1435 (3rd Cir. 1997) 5

Anderson v. Salt Lake Counties Corp., 475 F.2d 29 (10th Cir. 2002) 5

Bauchman for Bauchman v. West High Sch., 132 F.3d 542 (10th Cir. 1997) 5

Books v. Counties of Elkhart, Ind., 235 F.3d 292 (7th Cir. 2000), ... 21

Cantwell v. Connecticut, 310 U.S. 296 (1940) 17

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 6, 11-12

Davis v. Beason, 133 U.S. 333 (1890) 14, 15

Dred Scott v. Sandford, 60 U.S. 393 (1856) 10

Edwards v. Aguillard, 482 U.S. 578 (1987) 20-21

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 14, 16, 17

Freethought Soc'y v. Chester County, 334 F.3d 247 (3d Cir. 2003) 5

Girouard v. United States, 328 U.S. 61 (1946) 15

Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) 5

Holmes v. Jennison, 39 U.S. (14 Peters) 540 (1840) 4

King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003).....6, 21

Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999).....5

Lemon v. Kurtzman, 403 U.S. 603 (1971).....4, 12

Lynch v. Donnelly, 465 U.S. 668 (1984).....4

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....3, 4, 10, 11

Payne v. Tenn., 501 U.S. 808 (1991).....6

Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992).....6

Reynolds v. United States, 98 U.S. 145 (1878).....14

Richardson v. Goddard, 64 U.S. (How.) 28 (1859).....13

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).....11

School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963).....8, 9

South Carolina v. United States, 199 U.S. 437 (1905).....3

Torcaso v. Watkins, 367 U.S. 488 (1961).....14

United States v. Macintosh, 283 U.S. 605 (1931)..... 14, 15-16

Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003).....5, 21

Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970).....20

CONSTITUTIONAL PROVISIONS

U.S. Const. art. VI.....3

U.S. Const. amend. I.....2, 11, 13

Va. Const. art. I, § 16.....14, 17

STATUTES AND RULES

4 U.S.C. § 4.....18

28 U.S.C. § 453.....18

Ky. Rev. Stat. Ann. § 67.083(3) (Banks-Baldwin 2000)... 12-13

OTHER AUTHORITIES

John Adams, *The Works of John Adams, Second President of the United States*, vol. IX, (Boston: Little, Brown, and Co. 1854).....8

I William Blackstone, *Commentaries on the Laws of England* (Univ. of Chi. Facs. ed. 1765).....12

Constitution of Virginia, Bill of Rights (June 12, 1776), *reprinted in Sources of Our Liberties* (Perry rev. ed., Amer. Bar Found. ed. 1978).....14, 17

Declaration of Independence (1776).....7

Thomas M. Cooley, *General Principles of Constitutional Law* (Weisman pub. 1998) (1891).....19

Fact Sheets: Currency & Coins—History of "In God We Trust," United States Department of the Treasury, *at* http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.html.....18

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William J. Federer, *America's God and Country* (1994).....7

William J. Federer, *Treasury of Presidential Quotations* (2004).....9

H.R. Rep. No. 83-1693 (1954).....18

James Hutson, *Religion and the Founding of the American Republic* (1998).....8

Thomas Jefferson, "Virginia Act for Establishing Religious Freedom" (October 31, 1785), *reprinted in* 5 *The Founders' Constitution* (P. Kurland & R. Lerner eds. 1987).....16

James Madison, *The Federalist No. 37* (George W. Carey & James McClellan eds. 2001).....7-8

J. Madison, Letter to Thomas Ritchie, September 15, 1821, III *Letters and Other Writings of James Madison* (Philip R. Fendall ed. 1865).....4

J. Madison, *Memorial and Remonstrance* (1785).....14, 16

J. Madison, Congressional Debate on the Bill of Rights, *in* 1 *Annals of Cong.* 757 (1789) (Gales & Seaton's ed. 1834).....19

Mayflower Compact, reprinted in Our Nation's Archive: The History of the United States in Documents (Bruun & Crosby eds. 1999).....6-7

Northwest Ordinance of 1789, Article III, *reprinted in* William J. Federer, *America's God and Country* (1994) 8

Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (1992).....20

The Reports of the Committees of the House of Representatives of the United States for the First Session of the Thirty-Third Congress, 1854, The House Judiciary Committee, March 27, 1854 (Washington: A.P.O. Nicholson, 1854).....19-20

The Reports of the Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53, The Senate Judiciary Committee, January 19, 1853 (Washington: Robert Armstrong, 1853).....8-9

II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).....19

George Washington, *The Writings of George Washington*, vol. XXX, (Washington, D.C.: U.S. Government Printing Office 1932).....8

G. Washington, Thanksgiving Proclamation of October 3, 1789, *in* 4 *The Papers of George Washington, Presidential Series* (W. W. Abbot et al., eds., 1987)... 17-18

Noah Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828).....12

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments.

The Foundation has an interest in this case because it believes that the public posting of the Ten Commandments represents an important way in which government can acknowledge the sovereignty of God and His influence (past and present) on this nation. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the displays of the Ten Commandments at issue violate the words of the Establishment Clause.

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[1] *Amicus curiae* Foundation for Moral Law, Inc. files this brief by consent of counsel for both Respondents (letter filed with the Clerk of the Court granting blanket consent to any amicus briefs) and Petitioners (letter of consent filed with this brief). Counsel for *amicus* authored this brief in its entirety. No person or entity—other than the Foundation, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The display of the Ten Commandments on public property does not violate the Establishment Clause of the First Amendment because such displays do not implicate the text thereof, particularly as it was historically defined by common understanding at the time of the Amendment's adoption. The Ten Commandments displays ("the displays") erected by McCreary and Pulaski counties ("the Counties") are therefore constitutionally unobjectionable.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case tests that bear no resemblance to or take the focus away from the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and once again to embrace the plain and original text of the Constitution to guide its Establishment Clause jurisprudence.

The text of the Establishment Clause states that "Congress shall make no *law* respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are applied to the Ten Commandments displays at issue, it becomes evident that the displays are not a law, they do not dictate religion, and they do not represent a form of an establishment. Thus, a textual analysis demonstrates that the displays of the Ten Commandments in the courthouses of the Kentucky counties are not prohibited by the Establishment Clause.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE KENTUCKY COUNTIES' TEN COMMANDMENTS DISPLAYS SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's often conflicting and always perplexing Establishment Clause precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. It is time for this esteemed Court to return to the bright-line "test" that is the very words of the First Amendment of the United States Constitution.

A. Judges are sworn to uphold the written constitutional text.

Our constitutional paradigm dictates that *the Constitution itself* and all federal laws are the "supreme Law of the Land." U.S. Const. art. VI. All judicial officers—from inferior courts to this Court—take their oath of office to support *the Constitution itself* (and no person, office, or government body). *Id.* *Amicus* respectfully submits that this Constitution and its oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of this Supreme Court.

Chief Justice John Marshall, writing for this Court, observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the very purpose of a "*written*" constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. *See*

Marbury, 5 U.S. at 176-80. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id.* at 179-80. James Madison, the "father" of the Constitution, concurred in this view, stating that, "As a guide in expounding and applying the provisions of the Constitution . . . .the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, III *Letters and Other Writings of James Madison* 228 (Philip R. Fendall ed. 1865). This Court once believed that

> [i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."

Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).

B. The words of the First Amendment have been rejected in favor of *ad hoc* judicial gerrymandering.

Today, instead of applying, or at most explaining, the words of the First Amendment, this Court has led the federal judiciary to reject the very instrument judges are sworn to uphold: "[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984). Not surprisingly, the Sixth Circuit and the district court below attempted to draw the "line" in this case and evaluated these displays of the Ten Commandments under the guise of the textual substitution devised in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), at the expense of the actual words of the Establishment Clause.

Amicus is hardly making a novel point when it suggests that the alternatives the Court has crafted in the place of the text of the First Amendment have been weighed in the balance and been found wanting. As even the Sixth Circuit admitted in this very case, several "individual Supreme Court justices have expressed reservations regarding the test set forth in [*Lemon*] for determining whether a particular government action violates the Establishment Clause." *ACLU of Kentucky v. McCreary County, Kentucky*, 354 F. 3d 438, 445 (6th Cir. 2003).[2] These "reservations" are no doubt due in part to the myriad of results in the circuits throughout the country concerning religious displays. As the petitioners observed in their certiorari petition, just in cases involving the display of the Ten Commandments there have been decisions in the Third, Fifth, Tenth, and Eleventh Circuits that have arrived at different conclusions than the Sixth Circuit has in this case. *See Freethought Soc'y v. Chester County*, 334 F.3d 247 (3d Cir. 2003); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003); *Anderson v. Salt Lake Counties Corp.*, 475 F.2d 29 (10th Cir.

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[2] The Sixth Circuit's expression of frustration over the current state of Establishment Clause jurisprudence is mild compared to its fellow circuits'. For example, the Third Circuit Court of Appeals has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000); the Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999); and the Tenth Circuit opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

2002); and *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).

This confusion and criticism should not come as a surprise. When the policy of this Court is to eschew a "fixed *per se* rule," predictability in decision-making—a hallmark of true law—is also jettisoned. This Court should seek to provide a First Amendment jurisprudence that enjoys an "evenhanded, predictable, and consistent development of legal principles, [that would] foster[] reliance on judicial decisions." *Payne v. Tenn.*, 501 U.S. 808, 827 (1991); *see, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867-68 (1992).

The jurisprudential experiments with various extra-textual "tests" have produced a continuum of disparate results, often because of an attempt to achieve a "neutrality" concerning religion. *See e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) ("[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion relevant in any way to a person's standing in the community'"). But in so doing, this Court has strayed from the foundational principles of our constitutional system.

C. Textual infidelity has papered over America's history and constitutional government that *embraces* acknowledgments of God and public expressions of religion.

Our United States was never intended to be "neutral" on the issue of God. The Pilgrims landing at Plymouth Rock in 1620 each signed the *Mayflower Compact*, which declared that they had "undertaken for the Glory of God and Advancement of the Christian Faith, and the Honour of our King and Country, a voyage to plant the first colony in the northern Parts of Virginia . . . " *Our Nation's Archive: The History of the United States in Documents* 46 (Bruun & Crosby eds. 1999). In the *Fundamental Orders of Connecticut* of 1639, the first permanent governing document of that colony and a forerunner of several colonial constitutions, the people stated that they desired "an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require." *Colonial Origins of the American Revolution: A Documentary History* 211 (Donald S. Lutz ed. 1998).

The prominence of God in our nation's development continued during and after the American Revolution. God is referenced four times in the Declaration of Independence: He is called our "Creator" Who "endowed" us with "certain unalienable rights"; "Nature's God" Who instituted the "Laws of Nature"; the "Supreme Judge of the world"; and the One on Whom the Founding Fathers called upon for "the protection of divine Providence," as they pledged themselves to the cause of independence. *See Declaration of Independence* (U.S. 1776). Demonstrating that these references were not mere rhetorical flourish, the Continental Congress, on November 1, 1777, declared a day of national thanksgiving even in the midst of the war for independence because they believed "it is the indispensable Duty of all Men to adore the superintending Providence of Almighty God; to acknowledge with Gratitude their Obligation to him for benefits received, and to implore such further Blessings as they stand in Need of." *First National Proclamation of Thanksgiving, reprinted in* William J. Federer, *America's God and Country* 147 (1994). James Madison stated in *Federalist No. 37* that he believed that those who had participated in the Constitutional Convention of 1787 had "surmounted with an unanimity almost unprecedented" "so many difficulties" that "[i]t is impossible, for the man of pious reflection, not to perceive in it a finger of that Almighty Hand, which has been so frequently and signally extended to our

relief in the critical stages of the revolution." J. Madison, *The Federalist No. 37* 185 (George W. Carey & James McClellan eds. 2001).

Not only was the nation at its founding not neutral toward God, but also, as this Court noted in *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963), "religion has been closely identified with our history and government." The Declaration's primary author, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX, (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered like the Declaration of Independence to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance of 1789, Article III, *reprinted in America's God and Country*, at 484.

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854).

The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

S. Rep. No. 32-376 (1853).

As late as 1954 when Congress placed the words "under God" in the Pledge of Allegiance, President Dwight Eisenhower explained that such had been done to "reaffirm[] the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war." Speech of June 14, 1954, *reprinted in* William J. Federer, *Treasury of Presidential Quotations* 313-14 (2004).

These quotes from important figures throughout the history of the United States illustrate what this Court affirmed in *Abington*: "[T]hat the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Abington*, 374 U.S. at 213. Thus, the Constitution was not intended to require, nor until relatively recently was it interpreted to require, that God must be devalued in the public square in an attempt to achieve "neutrality" which supposedly prevents the possibility of some passerby suffering offense at the mention of God.

D. This Court should return to the fixed rule of the constitutional text.

Despite the obvious intention of the Constitution, made manifestly plain by the text of the First Amendment, this Court

has elected to stray from text and instead has formulated tests, *e.g.*, *Lemon*, "endorsement," "coercion," in the name of a kind of "neutrality" toward religion that is historically inaccurate and practically impossible to achieve. When the Court does this, it steps outside its proper role as an interpreter of the *text* and lays aside judicial robes in exchange for legislative pens, which is exactly what the Constitution, and the Establishment Clause in particular, is supposed to prevent.

Chief Justice Marshall asked in *Marbury*, "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?" 5 U.S. at 180. One dissenter in the infamous case of *Dred Scott* chastised the errant majority for not only rejecting the fundamental worth of a person, but the fundamental principles of constitutional interpretation. This Court would do well to consider Justice Benjamin Curtis's 148-year-old but still-relevant warning:

> And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

Dred Scott v. Sandford, 60 U.S. 393, 620-621 (1856) (Curtis, J., dissenting).

For too long, the "strict interpretation of the Constitution" has been abandoned, and "fixed rules" no longer govern Establishment Clause cases. This Court ought to decide this case according to the plain, and still unsullied, text of the First Amendment's Establishment Clause. *See Marbury*, 5 U.S. at 180.

II. THE KENTUCKY COUNTIES' COURTHOUSE TEN COMMANDMENTS DISPLAYS ARE NOT UNCONSTITUTIONAL BECAUSE THEY ARE NOT "LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend I. Whether the Ten Commandments were displayed alone or surrounded by a context of historical documents, in no way could the Counties' act of erecting the Ten Commandments be a "law respecting an establishment of religion."[3]

A. Neither the displays, nor the Counties' actions in relation to the displays, are "law[s]."

The Establishment Clause on its face restricts "laws," and this Court has recognized that the Clause was designed to restrict the exercise of "legislative power." *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). In "religious display" cases, however, this Court has, in effect, expanded its own power by unconstitutionally amending the Establishment Clause, ruling that the Clause may be violated

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[3] *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

either by a "statute or practice." *See Allegheny*, 492 U.S. at 592. Contrary to *Lemon*'s claim that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that this Court, therefore, "must draw lines" delineating what is constitutionally permissible, the text of the Establishment Clause contains a definite, straightforward meaning. *Lemon*, 403 U.S. at 612.

In its review of this case, the Sixth Circuit, like the district court below, incorrectly assumed that the actions of the Counties in erecting the courthouse displays that included the Ten Commandments amounted to "laws." However, not every action taken by a county under its constitutional and statutory authority constitutes a law.

At the time of the ratification of the First Amendment, Sir William Blackstone had defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Noah Webster's 1828 Dictionary states that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original).

The Counties have made no law. By erecting these courthouse displays, the Counties do not command any action from their residents, nor do they restrain them from any action or conduct that they wish to pursue. Likewise, the Counties have not stated or implied any intent to command their residents to perform any action or to prohibit their residents from any conduct by means of the courthouse displays. McCreary and Pulaski counties, like all Kentucky counties, have the statutory authority to "enact ordinances [and] issue

regulations" in performance of certain public functions. Ky. Rev. Stat. Ann. § 67.083(3) (Banks-Baldwin 2000). The Counties did not use their lawmaking authority; instead, they put up a wall display.

The Ten Commandments displays are simply displays on the wall of a government building, not an "ordinance" or "regulation" enacted or enforced by the Counties. In fact, there is no allegation by the plaintiffs of coercion of any kind; instead, they alleged merely that "they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business." *ACLU of Kentucky v. McCreary County, Ky.*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000).

Similar to an executive Thanksgiving proclamation, the courthouse displays "ha[ve] not the force of law, nor [were they] so intended." *Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) ("The proclamation . . . is but a recommendation. . . . The duties of fasting and prayer are voluntary, and not of compulsion, *and holiday is a privilege, not a duty*. . . . It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor"). At most, it could be argued that the courthouse displays serve as a *reminder* to citizens of certain standards of conduct. Thus, because the courthouse displays that include the Ten Commandments are not "law[s]," the Counties' displays do not violate the Establishment Clause.

B. The Counties' courthouse displays do not respect "an establishment of religion."

The Ten Commandments displays at issue do not violate the Establishment Clause because they do not "respect," *i.e.*, concern or relate to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added.)

1. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, in James Madison's *Memorial and Remonstrance*, and was embraced by this Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[4] "Religion" was defined as: "The duty which we owe to our Creator, and the manner of discharging it." Va. Const. of 1776, art. I, § 16; *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, this Court considered and rejected the argument that the First Amendment definition of religion included the practice of polygamy. In arriving at its conclusion, the Court applied the definition of "religion" contained in the Virginia Constitution as controlling the meaning of that term in the First Amendment. *Reynolds*, 98 U.S. at 163-66. It thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, "within the legitimate scope of the power of . . . civil government." *Id.*

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[4] The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

In *Beason*, the Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion."

> The term "religion" has *reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will*. . . . The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience . . . .

Beason, 133 U.S. at 342 (emphasis added).

In *Macintosh*, this Court's decision resulted in the denial of the respondent's application for citizenship by naturalization because the respondent refused to take an oath to bear arms in defense of the United States on the ground that he would have to believe the war in question was morally justified before he would take such action. 283 U.S. at 613-14, 618.[5] Chief Justice Hughes dissented in *Macintosh*, believing that the respondent's refusal to take the oath based on religious principle ought not disqualify him from citizenship. In part, Chief Justice Hughes reasoned:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, . . . : "The term 'religion' has reference to one's

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[5] The *Macintosh* decision was later reversed by this Court in *Girouard v. United States*, 328 U.S. 61 (1946).

> views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.

Macintosh, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Thus, Chief Justice Hughes's dissent in *Macintosh* was rooted in the historic constitutional definition of religion, a definition that presupposes God.

Sixteen years later in *Everson*, this Court noted that it had "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 Act for Establishing Religious Freedom]." *Everson*, 330 U.S. at 13. The "Virginia statute" explicitly founded its declaration of religious freedom on the basis that "Almighty God hath created the mind free" and that "all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy Author of our religion . . . ." Virginia Act for Establishing Religious Freedom (1785), *reprinted in* 5 *The Founder's Constitution* 84 (Kurland and Lerner eds., U. Chi. Press: 1987).

The *Everson* Court also emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id.* at 12. Indeed, Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution.

For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64.

Thus, this Court has recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16; *see also*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship"). Assuming, *arguendo*, that the Counties' actions of erecting the courthouse displays are in some sense "law[s]," such action cannot be considered laws concerning "religion" because, while the Ten Commandments address duties owed to the Creator, they do not address the *manner* of discharging those duties. For example, the commandment to "honor thy father and thy mother" does not dictate how this command is to be fulfilled; indeed, different religions and sects (*i.e.*, Protestantism, Catholicism, Judaism, Islam, etc.) detail different ways in which to fulfill this commandment. Something that constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do), but also *how* those commands and prohibitions are to be carried out. The Ten Commandments, by themselves, do not do both of these and hence cannot be considered a "religion" under the constitutional definition of the term.

Instead, these displays, by including the Ten Commandments, acknowledge God as the moral and historical foundation of the country's legal system. Examples of such acknowledgments are replete throughout our history. Thanksgiving proclamations encouraging citizens to offer gratitude to God for "His kind care and protection" have been

issued by Presidents of the United States ever since George Washington issued the first one on October 3, 1789. *See* 4 *The Papers of George Washington, Presidential Series* 131-32 (W. W. Abbot et al. eds. 1987). Since the passage of the Judiciary Act of 1789, all federal judicial officers have been required to take an oath of office swearing to support the United States Constitution that concludes with the phrase, "So help me God." *See* 28 U.S.C. § 453.

"In God We Trust" was first placed on the nation's coinage in 1864 to demonstrate, as then-Secretary of the Treasury Salmon P. Chase explained, the "[n]ational recognition" of "[t]he trust of our people in God." *See Fact Sheets: Currency & Coins—History of "In God We Trust,"* United States Department of the Treasury, *at* http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.html. The motto has appeared on all U.S. coins since 1938 and on all currency since 1964. *Id.*

As was previously mentioned, the words "under God" were added to the Pledge of Allegiance in 1954. *See* 4 U.S.C. § 4. The report from the House of Representatives that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 83-1693, at 2 (1954).

Posting the Ten Commandments, particularly in public facilities in which the law is adjudicated, represents another acknowledgment of God fitting with the tradition and obligation performed throughout the nation's history. Under no version of the facts presented could it be said that these courthouse displays represent an attempt by the Kentucky Counties to dictate the duties that their residents owe to the Creator, or to enforce the manner in which the residents should

discharge those duties. Consequently, the courthouse displays are not laws respecting an establishment of "*religion*."

2. The definition of "establishment"

Even if it is assumed that the courthouse displays are "law[s]" under the First Amendment—which they are not—and even if it is assumed that the displays pertain to "religion" under the First Amendment—which they do not—the courthouse displays do not represent an "establishment" of religion.

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II J. Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong.* 757 (1789) (Gales & Seaton's ed. 1834). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to

> teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. There never was an established religion without all these.

H.R. Rep. No. 33-124 (1854).

At the time of its adoption, therefore, "[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states." Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992). This Court's precedent is in agreement with this assessment, as the Court concluded that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970).

The Counties' courthouse displays that include depictions of the Ten Commandments do not in any fashion represent the setting up of a state-sponsored church, nor do they in any way lend government aid to one faith over another. Indeed, the text of the Ten Commandments used in the displays is simply taken directly from the King James Version of the Bible and does not include a numbering of the commandments, thus it is a deliberately non-sectarian version of the Ten Commandments. *McCreary*, 354 F.3d at 443 n.2. Moreover, the displays require negligible upkeep by the Counties.

This Court and multiple lower courts have recognized that the Ten Commandments hold an important place in this country's historical and legal tradition. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) ("the Ten Commandments [did not] play[] an exclusively religious role in the history of

Western Civilization."); *King v. Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) ("Much of our private and public law derives from these final six commandments."); *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003) ("Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society."); and *Books v. Counties of Elkhart, Indiana*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.").

Given the undeniable general influence of the Ten Commandments in this country's historical and legal tradition and the lack of any showing that the Counties' courthouse displays show support for or give aid to a particular church or religious sect, the displays cannot be said to concern an "*establishment*" of religion. Therefore, no portion of the Establishment Clause of the First Amendment prohibits public displays of the Ten Commandments.

CONCLUSION

For the reasons stated, this Honorable Court should reverse the Court of Appeals' decision below and hold that the Ten Commandments displays at issue do not violate the United States Constitution, that is, the text thereof.

Respectfully submitted,

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